IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

GREGORY L. WHISNANT v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for McMinn County
No. 07-520 Carroll L. Ross, Judge

No. E2008-00669-CCA-R3-PC - Filed February 24, 2009

A McMinn County jury found the Petitioner, Gregory L. Whisnant, guilty of carjacking. The trial court sentenced him to an eleven-year sentence, and this Court affirmed his conviction and sentence. The Petitioner filed a petition for post-conviction relief, claiming, among other things, that he failed to receive the effective assistance of counsel at trial. After a hearing, the post-conviction court dismissed the petition, and he now appeals, claiming that he received the ineffective assistance of counsel because Counsel did not prevent the admission into evidence of certain photographs. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Casey Stokes, Georgetown, Tennessee, for the Petitioner, Gregory L. Whisnant.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; R. Steve Bebb, District Attorney General; James Stutts, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This Court summarized the facts of this case on direct appeal:

> Ms. Edith Kay Harris, the victim, testified at trial that she worked as a medical assistant at Athens Regional Medical Center and drove her 2003 Toyota [4runner] to work on June 5, 2004, arriving at 7:30 a.m. She parked in the hospital parking lot in a space that faced away from the building and toward the street. She went to the passenger side door to retrieve her purse and carryall bag; she then "shut the door and locked [her] vehicle." When she had walked "about halfway across" the parking lot, the defendant emerged from the front doors of the hospital, carrying a blanket and a carryall bag.
>
> The victim testified that she encountered the defendant on the sidewalk and realized "he wasn't going to move" to allow her to pass. She testified that as she tried to walk around him, he said, "Give me those keys." When she declined, "the struggle started," and she testified, "He started pulling me towards my vehicle, and a tug of war was on. He would yank me and I'd literally come off my feet." The victim described a struggle in which she and the defendant moved "all the way down the parking lot . . . almost at my truck." The defendant finally wrested the keys from her.
>
> The defendant used the keys to unlock the victim's Toyota, inserted himself behind the wheel, and backed the vehicle out of the parking space, nearly hitting the victim. The victim ran into the hospital where she enlisted help in calling the police. She testified that the vehicle was worth approximately $25,000 on June 5, 2004.
>
> Athens Police Detective Fred Schultz testified that he was called to investigate the June 5 incident and that based upon the victim's information, the defendant first confronted the victim at a point 78 feet from the victim's vehicle, and the struggle ended at a point 38 feet from the vehicle. The victim's description of her assailant reminded the detective of an individual he had seen the night before at a gas station located next to the hospital. Detective Schultz testified that the police bulletin publishing the description of the vehicle and the perpetrator resulted in the arrest of the defendant-and discovery of the vehicle-in Alabama.
>
> Detective Schultz introduced into evidence photographs taken on June 8, 2004, that depicted the recovered Toyota [4runner] and its contents, including photographs of two envelopes and a checkbook bearing the defendant's name and

> Chattanooga address. Officer Schultz also found in the vehicle, and introduced a picture of, an Athens Regional Medical Center admission form bearing the defendant's name and the date June 4, 2004. The detective introduced a photograph of a black Nike visor recovered from the van, and he testified that the visor matched the visor he had seen the man wearing at the gas station on the evening of June 4, 2004. Detective Schultz found the victim's license tag lying on the Toyota's seat.
>
> Additionally, Detective Schultz testified that he interviewed the defendant, who was then in custody in Alabama. The detective introduced the defendant's written statement in which the defendant admitted that, following an automotive accident, he had been treated at Athens Regional Medical Center and was discharged on June 4, 2004. Because he was unsuccessful in obtaining a ride, the defendant spent the night around the gas station and in the hospital lobby. When he noticed a lady standing next to her vehicle in the hospital parking lot, he went into the lobby, picked up his bag and blanket, went toward the lady now on the sidewalk, spoke to her, grabbed her keys, and ran to the vehicle. In his statement, the defendant admitted driving the Toyota to Chattanooga and ultimately to Alabama. He stated that he took the vehicle because he "needed a way back to Chattanooga."
>
> The defendant elected not to testify and presented no evidence in his defense. The jury convicted the defendant of carjacking, and following sentencing, the defendant perfected a timely appeal.

State v. Gregory L. Whisnant, No. E2006-01107-CCA-R3CD, 2007 WL 1280722, at *1-2 (Tenn. Crim. App., at Knoxville, May 2, 2007), *perm. app. denied* (Tenn. Aug. 13, 2007). On direct appeal, this Court affirmed the Petitioner's conviction and sentence. *Id*. at *3.

B. Post-Conviction Hearing

At the post-conviction hearing, the Petitioner argued, among other things, that he failed to receive the effective assistance of counsel at trial because his trial attorney ("Counsel") failed to object zealously to the introduction of certain photographs at trial.[1] Counsel testified that he worked with the public defender's office in Madisonville, Tennessee, since 1992. Counsel stated that his trial strategy was to prove that what the Petitioner did was "[a]nything but a carjacking." Counsel then summarized his strategy saying, "This case was not a case of whodunit. This was a case of what is this case, is it a carjacking, is it something else." Counsel pointed out that the State had proven the Petitioner's identity as the carjacker several ways: someone from the hospital identified

[1] We will omit the testimony presented at the post-conviction hearing that pertained to the Petitioner's claims that he did not raise on appeal.

the Defendant; Detective Schultz saw the Defendant at a convenience store the day before the carjacking; and the victim identified the Petitioner as her attacker.

Pertaining to his management of the case, Counsel testified that he filed multiple motions. He remembered the Petitioner asked the court to remove him from the case, which the court granted; however, Counsel was subsequently reassigned the case. Counsel stated, "I didn't have any conflict with [the Petitioner]. [The Petitioner] did not seem to like me." Counsel also said that "as far as [he] knew, [he] did object to any irrelevant evidence" that the State sought to introduce. Counsel did not remember specifically objecting to the photographs the Petitioner believed to be especially damaging, and he said such objections would be in the transcript if he made them. Counsel saw the police department's photographs of the stolen vehicle when he talked with Detective Schultz. Overall, Counsel did not feel that his performance was ineffective.

On cross-examination, Counsel said he did not remember how many felony cases he had tried in the past. He felt he was "familiar with and understood" the carjacking statute. He said he filed motions for discovery, for a bill of particulars, and to suppress the Petitioner's prior convictions. He also requested a mental evaluation for the Petitioner. Counsel said the Petitioner never told him the names of any witnesses he wanted called. Counsel said he tried to visit the Petitioner on November 8, 2004, but the Petitioner refused to come out of his cell. Counsel visited the Petitioner on December 28, 2004; on January 10, 2005, which was when the Petitioner said he did not want Counsel to represent him; and on May 2, 2005, which was after Counsel was reappointed to represent the Petitioner. The Petitioner rejected a guilty plea offer from the State because it included a conviction of carjacking.

Wylie Richardson, the prosecuting attorney, testified that he did not remember making any deals with witnesses in this case. He said that although he had a list of potential witnesses, he only called the victim and Detective Schultz to testify at trial. Richardson said Detective Schultz had some photographs of the vehicle at issue that he took pursuant to his inventory of the vehicle. The photographs showed the exterior of the vehicle and the items left in the vehicle. Richardson said he let Counsel view the photographs the morning of trial, which was as soon as the State became aware of them. On cross-examination, Richardson said the Petitioner gave a statement to the police.

The Petitioner testified that he met with Counsel at his arraignment. He said that he later called Counsel's office to speak about his case, but there was no answer. The Petitioner said that he met with Counsel on December 28, 2004, and that, on January 10, 2005, he told Counsel not to represent him. The Petitioner said he wore a civilian's striped shirt with blue jeans and orange house shoes to court. The Petitioner also testified that, despite his requests, by the time of the post-conviction hearing, he had not received information about his case.

On cross-examination, the Petitioner stated that another inmate prepared his petition for him.

Additionally, the Petitioner explained that he wanted Counsel to suppress his statements to the police, where he admitted stealing the keys and the vehicle, because they were coerced. He also claimed he did not discuss his trial strategy with Counsel, and he wished Counsel had subpeonaed the police officer who wrote the initial police report and the officer who retrieved the vehicle. The Petitioner admitted that he did not tell Counsel about any witnesses, and he said he did not know what the police officers he wished to have testify might have said. The Petitioner also thought the mental evaluation, which concluded he was competent to stand trial, was not performed correctly. He claimed that an expert should have testified, but about what he did not know. The Petitioner agreed that he had signed for receipt of his discovery material. The Petitioner admitted that the photographs introduced as evidence showed the Petitioner's checkbook in the stolen vehicle.

After hearing the evidence presented, the post-conviction court denied the Petitioner's claim for post-conviction relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner claims Counsel was ineffective for failing to object zealously to the introduction of certain photographs at trial. The State argues that the Petitioner has not met the burden of proving the allegations of ineffective assistance of counsel by clear and convincing evidence. We agree with the State.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

The post-conviction court found as follows: "This court specifically finds that counsel made adequate preparation for this case. In light of the overwhelming evidence in this case, it is hard to imagine a strategy other than that which defense counsel used at trial." The trial court added, "The fact that the petitioner did not like the result of the trial is not grounds for post conviction relief. There was no evidence to show that counsel was in any way ineffective in his defense of the petitioner."

The Petitioner contends that Counsel failed to object and successfully keep certain photographs of the stolen vehicle out of evidence. The Petitioner did not enter those photographs into evidence at the post-conviction hearing for the court to review. Moreover, the Petitioner did not support his claim that these photographs were specifically detrimental and prejudicial to the Petitioner's case with argument or citation to authorities. The photographs apparently linked the Petitioner to the stolen vehicle because they showed his checkbook in the vehicle. There was already ample testimony in the record that identified the Defendant as the person who stole the victim's car. Additionally, the Defendant admitted to stealing the victim's keys from her and then stealing the vehicle. That Counsel did not successfully suppress these photographs does not render his representation of the Petitioner ineffective. The Petitioner has failed to show by a preponderance of the evidence that the post-conviction court ruled erroneously. *House*, 44 S.W.3d at 515. The Petitioner is not entitled to relief on this issue.

IV. Conclusion

After a thorough review of the record and the applicable law, we conclude that the Petitioner was afforded the effective assistance of counsel. We affirm the post-conviction court's judgment.

_____

ROBERT W. WEDEMEYER, JUDGE